St. John's Law Review

Volume 80
Number 2 *Volume 80, Spring 2006, Number 2*

Article 5

February 2012

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BEYOND TERRORISM: THE POTENTIAL CHILLING EFFECT ON THE INTERNET OF BROAD LAW ENFORCEMENT LEGISLATION

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INTRODUCTION

Terrorists manipulate themselves to society's center stage by exploiting the omnipresence of the media within the modern information age. It is generally understood that, for so much as the cause of modern international terrorism seems to cast itself as diametrically opposed to western values and modernity, its proponents are unafraid to utilize the Internet to further their goals of disruption and destruction. In many ways, the information age is the great enabler of terrorism, providing not only the channels for terrorists to communicate amongst themselves throughout the globe, but also providing them the opportunity to amplify their voice, spread their message, and permeate the homes of those plugged into the modern world of interconnectivity.

Both the ubiquity of the Internet and its connection with terrorism distinguish the new millennial era from previous eras of war or crises. The United States' war on terrorism comprises a global effort; terrorism's war on the United States pervades the consciousness of the interconnected multitudes in an effort to shatter our political will.[1] In many ways, the decentralized, networked, and amorphous characteristics of the Internet resemble those of the modern terrorist infrastructure. The same properties that make the Internet such a powerful conduit for

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[1] *See* Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL'Y REV. 185 (2002) ("The very point of terrorism, the brand of warfare we face now as a nation, is to shatter our political will.").

progress, free expression, and the unhindered exchange of ideas also make it an ideal haven from where those who wish to perpetuate terror can strike. So far as the Internet is concerned, this is the conundrum faced by lawmakers as they seek to confront terror. The policies formed from the rapid enactment of antiterrorism legislation will likely have an adverse effect on the online environment that has burgeoned in the absence of regulation. The difficulty lies in discerning where to draw the line between legislation that may provide only ancillary benefits to antiterrorism efforts while burdening civil liberties, and legislation that may thwart terrorism and justify the sacrifice of certain freedoms.

It is easy to take for granted the ability to speak freely. It may seem quaint to talk of the need to protect some of these fundamental liberties amidst the images of terror on the evening news and throughout the Internet. But now is precisely the time to evaluate the freedoms that recent generations have been able to take for granted. The protections afforded by the First Amendment to each citizen of this country appear more fragile and certainly less quaint when one considers that most countries afford no such protections, and in fact may be retreating from any protection that may have existed.[2]

The freedom versus security grapple has enveloped public debate since the establishment of the United States.[3] It is impossible, however, to undertake this familiar debate without examining First Amendment freedoms against the modern backdrop of the information age. Unfortunately, there are no robust principles that comport with an era so dependent upon the First Amendment.[4] Similarly, there is no analogue in history to the modern threat of global terrorism that plagues the information society. It is therefore conceivable that existing First Amendment jurisprudence may not provide the appropriate framework to properly evaluate the degree to which the Internet may withstand the erosion of certain civil liberties.

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[2] *See, e.g.*, Seth Mydans, *Russian TV Newsman Fired in Media Crackdown*, N.Y. TIMES, June 3, 2004, at A10 (citing an example of Russian President Vladimir Putin's tightening of control over the news media).

[3] Recall Benjamin Franklin's famous warning: "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety." Benjamin Franklin True Patriot Act, H.R. 3171, 108th Cong. § 2(1) (2003).

[4] *See* discussion *infra* notes 148–50 and accompanying text.

With the prevalence of the Internet, the considerations attendant to its existence and role within society become an integral component to the freedom-security dialectic. Of specific interest within the scope of this Note is whether we should allow for broader exceptions to First Amendment protections to afford us a method by which to combat terrorism. While acknowledging the validity of both the distress over free speech abridgment and the desire to ensure the safety of our nation and its citizens, this Note seeks to explore whether cyberspace requires analysis distinct from that which applies to the traditional free speech areas. To this end, Part I of this Note addresses the enactment of those antiterrorism laws which potentially burden free speech and the debate over whether those laws should be truncated or expanded. Part II sketches the twentieth century evolution of First Amendment jurisprudence and the application of free speech principles to the Internet. The analysis in Part III defends the quick action taken by Congress to grant authority in an emergency situation, but qualifies that defense by reinforcing the need for deliberation. The analysis then shifts to pinpointing those considerations for deliberation unique to the Internet and seeks to identify some of the dangers of broadening authority beyond the scope immediately necessary to confront the modern threat of terrorism.

I. FREE SPEECH CONCERNS ARISING FROM THE PATRIOT ACT AND OTHER ANTITERRORISM LAWS

A. The Civil Liberties Abridgment Inherent in Antiterrorism Legislation

Congress passed the Patriot Act into law on October 29, 2001.[5] The enactment of such a sweeping bill just over a month after the worst terrorist act this nation had ever suffered suggests a lack of deliberation.[6] This urgency reflected the desperation the citizens of this country felt as a whole. But the

[5] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). *See generally* Robert O'Harrow Jr., *Six Weeks in Autumn*, WASH. POST, Oct. 27, 2002, at W6 (describing the passage of the Patriot Act).

[6] *See* Doe v. Ashcroft, 334 F. Supp. 2d 471, 491 (S.D.N.Y. 2004) (noting that numerous discrepancies within Section 505 of the Patriot Act may evidence poor or hasty congressional drafting).

Patriot Act was not the first piece of legislation to address terrorism.[7] Nor was it the first to be challenged as violative of First Amendment rights.[8] The Patriot Act, however, expanded much of the prior legislation.[9] As its formal name—Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act—suggests, the Patriot Act packaged numerous amendments that altered many of the previous laws to provide for greater law enforcement capabilities.[10] As such, it remains the culmination of the antiterrorism effort. In fact, the name "Patriot Act" carries with it the connotation of all antiterrorism activity, and is both a rally point for supporters and a target for critics.[11]

1. Material Support

The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996 provided the ability to target Foreign Terrorist Organizations ("FTOs") by criminalizing activities that support such organizations.[12] The procedures established by the AEDPA authorize the government to designate certain groups as FTOs[13] and make it a crime to provide "material support" to any

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[7] *See, e.g.*, Antiterrorism Act of 1990, Pub. L. No. 101-519, § 132, 104 Stat. 2240, 2250–52 (extending United States criminal jurisdiction to include terrorist acts). Chapter 113B under Title 18 of the United States Code houses legislation enacted over the past fifteen years to address the terrorism threat to our nation. 18 U.S.C. §§ 2331–2339B (2000).

[8] *See* Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1180 (C.D. Cal. 1998), *aff'd*, 205 F.3d 1130 (2000) (challenging the classification of the Partiya Karkeran Kurdistan and Liberation Tigers of Tamil Eelam as foreign terrorist organizations under the Antiterrorism and Effective Death Penalty Act of 1996).

[9] *See, e.g.*, *infra* notes 21–22 and accompanying text.

[10] *See, e.g.*, USA PATRIOT Act § 805 (amending 18 U.S.C. § 2339A to broaden the jurisdiction of federal courts in terrorism support cases); *id.* § 806 (amending 18 U.S.C. § 981(a)(1) to expand the scope of assets subject to forfeiture).

[11] *See* Paul Rosenzweig, *Civil Liberty and the Response to Terrorism*, 42 DUQ. L. REV. 663, 663–64 (2004) (attaching the label of "anti-antiterrorism movement" to the aggregate of those voices which are critical of the antiterrorism effort).

> The thesis of the [anti-antiterrorism] movement, which has some of the appearances of a political campaign, is that steps being taken domestically to combat the potential for terrorist attacks are too intrusive and a threat to cherished civil liberties.
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> The principal focus of the campaign is the USA PATRIOT Act . . . .

Id. at 663.

[12] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[13] *Id.* § 219 (codified at 8 U.S.C. § 1189). This section authorizes the Secretary of State, in consultation with the Secretary of Treasury and the Attorney General, to

of these designated FTOs.[14] A year after the enactment of the AEDPA, the Secretary of State designated thirty organizations as FTOs.[15] Not long after that, several humanitarian groups and citizens brought suit challenging the constitutionality of the provisions.[16] These groups had sought to provide support to the nonviolent humanitarian and political activities of several of the designated FTOs, but abstained from providing any such support for fear of criminal prosecution.[17] The plaintiffs argued that such a prohibition on support infringed their associational rights under the First Amendment.[18] The plaintiffs also challenged the Secretary of State's "unfettered and unreviewable authority to designate" FTOs, and alleged that the AEDPA is unconstitutionally vague.[19] While rejecting the first two arguments, the Ninth Circuit Court of Appeals held that the terms "training" and "personnel"—two of the enumerated activities constituting material support—were unconstitutionally vague.[20]

The Patriot Act expanded the material support section of the

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designate an organization as a Foreign Terrorist Organization if 1) the organization is a foreign organization, 2) it engages in terrorist activity, and 3) such activity threatens the security of the United States or its nationals. *See id.*

[14] *Id.* § 303 (codified at 18 U.S.C. § 2339B). Section 303 stated the unlawful act as follows: "Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both." *Id.* The phrase "material support or resources" is defined as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." *Id.* § 323. (codified at 18 U.S.C. § 2339A(b)).

[15] *See* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133 (9th Cir. 2000); *see also* Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650–51 (Oct. 8, 1997).

[16] *See* Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1179 (C.D. Cal. 1998), *aff'd*, 205 F.3d 1130 (2000).

[17] *Id.* at 1180.

[18] Humanitarian Law Project v. Reno, 205 F.3d at 1133. The right to associate falls within First Amendment jurisprudence and is thus generally protected in the absence of specific intent to commit unlawful acts. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 929–31 (1982) (holding that for association to be grounds for liability, it is necessary to establish that a party authorize or ratify unlawful acts of the person or group with whom the party is associated).

[19] Humanitarian Law Project v. Reno, 205 F.3d at 1133.

[20] *See id.* at 1137–38.

AEDPA.[21] One of the more controversial provisions within the Patriot Act, Section 805, amended the material support section to include "expert advice or assistance" among the enumerated banned activities.[22] The material support provision has become the workhorse statute for terrorism prosecutions.[23] Not surprisingly, it has become a frequent target of constitutional challenges.[24] These challenges arise both as a defense in criminal cases[25] and through preemptive challenges, as in the injunction sought by the Humanitarian Law Project.[26] Generally, courts have upheld the section against First Amendment challenges,[27] but some courts have held select portions to be impermissibly vague.[28] Notably, however, courts

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[21] *See* USA PATRIOT Act, Pub. L. No. 107-56, § 805, 115 Stat. 272 (2001) (expanding the Antiterrorism and Effective Death Penalty Act of 1996 § 303).

[22] *Id.* The full definition of material support can be found in 18 U.S.C. § 2339A(b)(1):

> [T]he term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, *expert advice or assistance*, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . , and transportation, except medicine or religious materials.

Id. (emphasis added). Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004 defined "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge." Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 § 6603, 118 Stat. 3762–64 (codified at 18 U.S.C. § 2339A(b)(3)).

[23] *See* Laurie L. Levenson, *Prosecuting Terrorists*, 26 NAT'L L.J. 12 (2004) (reporting that dozens of people, including "some of the highest profile defendants," are being prosecuted under the statute); *see also* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 8 (2003) (describing the targeting of material support to terrorist organizations as "the linchpin of the government's current war on terrorism"). "Virtually every criminal 'terrorism' case that the government has filed since September 11 has included a charge that the defendant provided material support to a terrorist organization." *Id.* at 9.

[24] *See supra* note 16; *infra* notes 25–26.

[25] *See, e.g.*, United States v. Al-Arian (*"Al-Arian I"*), 308 F. Supp. 2d 1322, 1333–34 (M.D. Fla. 2004).

[26] Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1179 (C.D. Cal. 1998); *supra* notes 15–19 and accompanying text.

[27] *See* People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238, 1244–45 (D.C. Cir. 2003); Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135–37 (9th Cir. 2000); *Al-Arian I*, 308 F. Supp. 2d at 1343; United States v. Sattar, 272 F. Supp. 2d 348, 361–62, 368 (S.D.N.Y. 2003); United States v. Lindh, 212 F. Supp. 2d 541, 568–74 (E.D. Va. 2002).

[28] *See* Humanitarian Law Project v. Reno, 205 F.3d at 1137–38 (holding that the

have tended to deny recognizing the more classic First Amendment challenges of overbreadth[29] and associational violations.[30]

2. Definition of Domestic Terrorism

In close relation to the issues surrounding the material support provision is the apprehension regarding Congress's inclusion of a definition for "domestic terrorism" within the Patriot Act.[31] Civil liberties groups claim that this section could be misused to attack legitimate political advocacy groups.[32] The American Civil Liberties Union ("ACLU") expressly opposed this

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terms "training" and "personnel" are unconstitutionally vague); Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1200 (C.D. Cal. 2004) (expanding its catalog of unconstitutionally vague material support provisions to include the phrase "expert advice or assistance"); *Sattar*, 272 F. Supp. 2d at 356–61 (dismissing the counts of the indictment based on the vagueness of the terms "communications equipment" and "personnel"). *But see Lindh*, 212 F. Supp. 2d at 573–74 (finding the phrases "personnel" and "services" not to be vague and expressly disagreeing with the *Humanitarian Law Project* cases).

[29] *See, e.g.*, Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d at 1201–02 (denying the plaintiff's claim that the phrase "expert advice and assistance" is substantially overbroad). "[T]here comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law—particularly a law that reflects legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Id.* at 1201 (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003)). The court stated that the Supreme Court required that application to protected speech of the law in question be substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications before applying the 'strong medicine' of the overbreadth invalidation." *Id.* (quoting *Hicks*, 539 U.S. at 120).

[30] *See, e.g.*, *Sattar*, 272 F. Supp. 2d at 368. For an example of punishment for associational activity, see *infra* note 101 (discussing Senator McCarthy's campaign to punish Communist association).

[31] *See* USA PATRIOT Act, Pub. L. No. 107-56, § 802, 115 Stat. 272 (2001); 18 U.S.C. § 2331(5) (2004). Section 802 amended the definitions for terrorism under 18 U.S.C § 2331 to include domestic terrorism. *Id.* The amendment defines domestic terrorism as activities that:

> (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
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> (B) appear to be intended—
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> (i) to intimidate or coerce a civilian population;
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> (ii) to influence the policy of a government by intimidation or coercion; or
>
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
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> (C) occur primarily within the territorial jurisdiction of the United States.

Id.

[32] *See* American Civil Liberties Union, How the USA-Patriot Act Would Convert Dissent into Broadly Defined "Terrorism," (Oct. 23, 2001) (unpublished).

new definition of domestic terrorism, claiming that it can be used to prosecute dissidents and those who may provide assistance as minimal as lodging.[33] Others have expressed concern that the new definition of domestic terrorism could theoretically include violations of state or federal law as wide ranging as getting into a bar fight or reckless driving.[34] The Justice Department, however, has defended the defined crime of domestic terrorism against these allegations, claiming that peaceful political organizations involved in political advocacy would not fall within the scope of the definition.[35]

3. Enhanced Surveillance Procedures

Title II of the Patriot Act contains a series of provisions that enhance the surveillance power of the government.[36] Section 201 grants the government authority to intercept wire, oral, and electronic communications where there has been evidence of material support to terrorism.[37] Section 202 grants such authority in instances involving computer fraud and abuse.[38] Section 209 allows for the seizure of voice mail messages.[39] Section 214 deals with pen register[40] and trap and trace[41]

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[33] *See id.*

> The ACLU does not oppose the criminal prosecution of people who commit acts of civil disobedience if those acts result in property damage or place people in danger. That type of behavior is already illegal and perpetrators of these crimes can be prosecuted and subjected to serious penalties. However, such crimes often are not "terrorism." The legislative response to terrorism should not turn ordinary citizens into terrorists.

Id.

[34] Anita Ramasastry, *Patriot II: The Sequel Why It's Even Scarier than the First Patriot Act*, FINDLAW, Feb. 17, 2003, http://writ.findlaw.com/ramasastry/20030217.html (expressing concern that such a broad classification standard would subject individuals to civil liberties infringements such as extensive surveillance).

[35] *See* U.S. Dep't of Justice, Dispelling the Myths, http://www.lifeandliberty.gov/subs/u_myths.htm (last visited Jan. 23, 2006) (supporting "peaceful political discourse and dissent" as among "America's most cherished freedoms").

[36] *See* USA PATRIOT Act § 201.

[37] *Id.* § 201.

[38] *Id.* § 202. Section 202, entitled "Authority to Intercept Wire, Oral, and Electronic Communications Relating to Computer Fraud and Abuse Offenses," purports no relationship to terrorism. *Id.* Instead, it expands the government's surveillance ability where there has been a violation of § 1030 of the United States Code, the statute dealing with computer fraud. *See* 18 U.S.C. § 1030 (2004).

[39] USA PATRIOT Act § 209. This section essentially extended the ability to seize email to the ability to seize voicemail as well, replacing throughout 18 U.S.C. § 2510 the word "electronic" with "wire or electronic." *Id.*; 18 U.S.C. § 2510 (2004).

[40] 18 U.S.C. § 3127(3) contains the following definition of "pen register":

authority under the Foreign Intelligence Surveillance Act ("FISA").[42]

These surveillance sections were enacted as "sunset" provisions, set to expire after four years.[43] Considering that these sections deal directly with communications and information technology, the potential exists for such intrusion to chill communications.[44] The choice to include a sunset provision seemingly demonstrates Congress's trepidation over these sections. Of particular concern is the absence of any reference to terrorism in Section 202,[45] and that the authority granted under Section 201 is triggered by the much-questioned material support section.[46]

4. Access to Records

Akin to the surveillance ability granted by the Patriot Act to the government is the expansion of the ability to access records previously established by FISA.[47] Section 215 has received much press for its grant of authority allowing the access of library records.[48] In addition to privacy issues, there is also concern that

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> [A] device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication, but such term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

18 U.S.C. § 3127(3) (2004).

[41] 18 U.S.C. § 3127(4) contains the following definition of "trap and trace device":

> [A] device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication.

18 U.S.C. § 3127(4) (2004).

[42] USA PATRIOT Act § 214. This section amended sections 402 and 403 of the Foreign Intelligence Surveillance Act ("FISA") of 1978. *Id.*

[43] *See id.* § 224.

[44] *See infra* notes 120–21 and accompanying text (describing the chilling effect).

[45] *See* USA PATRIOT Act § 202.

[46] *See id.* § 201.

[47] *See id.* § 215 (codified at 50 U.S.C. § 1861).

[48] *See id.*

this provision will result in a chilling effect upon people's reading habits.[49] Within the context of the Internet, online vendors have claimed this provision has had an adverse impact on e-commerce, with the thrust of the dissension coming from online booksellers.[50] Although the government has provided limited information to the public regarding its use of this section,[51] the Justice Department disclaims any charges of abuse and suggests that concerns over library surveillance are overblown.[52] As with the surveillance provisions, this section was enacted as a sunset provision, scheduled to expire after four years.[53]

5. National Security Letters

In Section 505 of the Patriot Act, Congress expanded the authority of the Federal Bureau of Investigation ("FBI") to issue national security letters ("NSLs") that compel communications firms—such as Internet service providers ("ISPs") or telephone companies—to produce certain customer records whenever the FBI certifies that those records are "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities."[54] The statute limits access to those investigations "not conducted solely on the basis of activities protected by the [F]irst [A]mendment,"[55] but it also includes a non-disclosure provision, which has generated concern. Thus, while the examination of records in general may

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[49] *See* Kathryn Martin, Note, *The USA Patriot Act's Application to Library Patron Records*, 29 J. LEGIS. 283, 288–92 (2003).

[50] *See* Bob Tedeschi, *E-Commerce Report; The Patriot Act Has Led Online Buyers and Sellers To Watch What They Do. Could it Threaten Internet Business?*, N.Y. TIMES, Oct. 13, 2003, at C6 (reporting the perceived chilling effect Section 215 has had over online booksellers and their customers).

[51] *See* ACLU v. Dep't of Justice, 321 F. Supp. 2d 24, 37 (D.C. Cir. 2004) (ordering the government to release some of its records relating to its activity pursuant to section 215, but acknowledging that some records were properly withheld under Exemption 1 of the Freedom of Information Act ("FOIA")). "Since its implementation, the government has provided limited information to the public regarding its use of section 215." *Id.* at 26.

[52] *See* U.S. Dep't of Justice, *supra* note 35. The Justice Department has repeatedly claimed that the government has no interest in the reading habits of citizens. *Id.*

[53] *See* USA PATRIOT Act § 224.

[54] USA PATRIOT Act § 505(a) (codified at 18 U.S.C. § 2709). "The FBI's demands under § 2709 are issued in the form of national security letters ("NSLs")." Doe v. Ashcroft, 334 F. Supp. 2d 471, 475 (S.D.N.Y. 2004).

[55] USA PATRIOT Act § 505(a) (codified at 18 U.S.C. § 2709).

provoke apprehension over infringement on civil liberties and the potential for a derivative chilling effect, the inclusion of a non-disclosure provision raises a pure First Amendment issue.[56]

In *Doe v. Ashcroft*, the New York District Court enjoined both the issuance of NSLs and the enforcement of the non-disclosure provision, finding that the former violated the Fourth Amendment and that the latter violated the First Amendment.[57] The court hypothesized, based on numerous drafting discrepancies, that the legislation may have been hastily drafted.[58] Acknowledging that several bills pending in Congress would clarify these discrepancies,[59] the court stated that it would, regardless of such clarifying amendments, find that the statute exerts a coercive effect on NSL recipients.[60] The court also found that the non-disclosure provision allowing perpetual secrecy was too broad and open-ended and thus constituted both a prior restraint on speech and a content-based restriction.[61]

B. Varied Responses to the Patriot Act

Congressional unity in the weeks after the terrorists attacked on September 11 has fractured; so has much of the public opinion regarding the Patriot Act and its effects—and potential effects—upon the civil liberties of citizens.[62] In a free society, total security is a utopian concept, as perfect security would essentially entail the end of liberty.[63] The debate thus

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[56] *See Doe*, 334 F. Supp. 2d at 475 ("[N]ational security letters ('NSLs') . . . constitute a unique form of administrative subpoena cloaked in secrecy and pertaining to national security issues. The statute bars all NSL recipients from ever disclosing that the FBI has issued an NSL.").

[57] *Id.* at 526–27.

[58] *See id.* at 491 ("Are the various differences between § 2709 and other analogous statutes, extensive as the discrepancies are, simply the product of poor or hasty congressional drafting?").

[59] *See* Anti-Terrorism Intelligence Tools Improvement Act of 2003, H.R. 3179, 108th Cong. (2003); Antiterrorism Tools Enhancement Act of 2003, H.R. 3037, 108th Cong. (2003); Judicially Enforceable Terrorism Subpoenas Act of 2004, S. 2555, 108th Cong. (2004).

[60] *Doe*, 334 F. Supp. 2d at 494.

[61] *Id.* at 511–12. "Without detailing the degree of narrow tailoring which the First Amendment demands with respect to § 2709, the [c]ourt concludes that § 2709 is not sufficiently narrow." *Id.* at 514.

[62] *Compare supra* Part I.B.1 (describing the movement to narrow the Patriot Act) *with supra* Part I.B.2 (describing support for expanding law enforcement authority).

[63] *See* Benjamin Franklin True Patriot Act, H.R. 3171, 108th Cong. § 2(1) (2003).

demands focus on the practical questions of which liberties may be compromised and to what extent they should be compromised. Lawmakers continue to deliberate these questions.

1. The Movement to Narrow the Patriot Act

Deeply troubled by the lack of debate and suspension of the normal review process that accompanied the enactment of the Patriot Act, civil liberties groups have urged Congress to exercise its plenary powers to hold oversight hearings and require ongoing reports regarding the implementations by law enforcement of the powers granted to it by the Act.[64] The addition of a sunset clause evidences Congressional distress over the abridgment of normal legislative process.[65] Pursuant to these concerns, the House Committee on the Judiciary began conducting oversight of the Department of Justice's implementations of the Patriot Act within a year of the act's passage into law.[66]

Some lawmakers have taken the floor to speak out against the overbreadth of the Patriot Act,[67] while others have introduced bills for narrowing the scope of certain provisions of the Act.[68] The 210 to 210 deadlock vote in the House in July, 2004, on a proposal that would have barred the federal government from demanding library and other records, exemplifies the

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[64] *See, e.g.*, ELEC. FRONTIER FOUND., USAPA SUNSET PROVISIONS COULD LEAVE CONGRESS IN THE DARK, http://www.eff.org/Privacy/Surveillance/Terrorism/20011212_eff_usapa_sunset_analysis.html (last visited Mar. 22, 2006).

[65] *See id.*; USA PATRIOT Act, Pub. L. No. 107-56, § 224, 115 Stat. 272 (2001).

[66] *See* Letter from Representatives F. James Sensenbrenner and John Conyers, Chairman and Ranking Member, House Comm. on the Judiciary, to Honorable John D. Ashcroft, Attorney Gen. of the U.S. (June 13, 2002). In conducting such oversight, Representatives F. James Sensenbrenner and John Conyers, chairman and ranking member of the House Committee on the Judiciary respectively, addressed this letter to Attorney General John Ashcroft on July 13, 2002 asking the Attorney General to answer fifty questions regarding the implementations of the Patriot Act. *Id.*

[67] *See, e.g.*, 147 CONG. REC. E2283 (2001) (statement of Rep. Woolsey). "The Bill of Rights, civil rights and civil liberties must not be the 'other victim' of terrorism." *Id.* In explaining his vote against the Patriot Act, Representative Woolsey compared the Attorney General's tactics pursuant to the Patriot Act to the "preventive" intelligence campaign of J. Edgar Hoover. *Id.* Representative Woolsey recalled how Hoover's "Red Squads" abused liberties and were seldom effective. *Id.*

[68] *See, e.g.*, Security and Freedom Ensured ("SAFE") Act of 2003, S. 1709, 108th Cong. (2003) ("To amend the USA PATRIOT ACT to place reasonable limitations on the use of surveillance and the issuance of search warrants, and for other purposes.").

divisiveness amongst lawmakers.[69] This was just one of several proposals introduced in either house of Congress to reform the Patriot Act.[70] Among the reform bills that have been introduced in the Senate are the Citizens' Protection in Federal Databases Act,[71] the Library and Bookseller Protection Act,[72] the Protecting the Rights of Individuals Act,[73] the Domestic Surveillance Oversight Act of 2003,[74] the Library, Bookseller, and Personal Records Privacy Act,[75] and the Security and Freedom Ensured ("SAFE") Act of 2003.[76] Several bills were introduced into the House as well: the Benjamin Franklin True Patriot Act,[77] the Freedom to Read Protection Act of 2003,[78] and the Surveillance Oversight and Disclosure Act of 2003.[79] Capitol Hill, however, has not been the only forum for challenging those sections within

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[69] *See* Eric Lichtblau, *Effort to Curb Scope of Antiterrorism Law Falls Short*, N.Y. TIMES, July 9, 2004, at A16. A last minute Republican rally brought the vote to the tie, which by House rules rendered the amendment defeated. *Id.*

[70] The Electronic Frontier Foundation hosts a webpage that keeps tabs on Patriot Act-related bills. Electronic Frontier Foundation, http://www.eff.org/patriot/bills.php (last visited Mar. 22, 2006).

[71] S. 1484, 108th Cong. (2003) ("To require a report on Federal Government use of commercial and other databases for national security, intelligence, and law enforcement purposes, and for other purposes.").

[72] S. 1158, 108th Cong. (2003) ("To exempt bookstores and libraries from orders requiring the production of tangible things for foreign intelligence investigations, and to exempt libraries from counterintelligence access to certain records, ensuring that libraries and bookstores are subjected to the regular system of court-ordered warrants.").

[73] S. 1552, 108th Cong. (2003) ("To amend title 18, United States Code, and the Foreign Intelligence Surveillance Act of 1978 to strengthen protections of civil liberties in the exercise of the foreign intelligence surveillance authorities under Federal law, and for other purposes.").

[74] S. 436, 108th Cong. (2003) ("To amend the Foreign Intelligence Surveillance Act of 1978 to improve the administration and oversight of foreign intelligence surveillance, and for other purposes.").

[75] S. 1507, 108th Cong. (2003) ("To protect privacy by limiting the access of the Government to library, bookseller, and other personal records for foreign intelligence and counterintelligence purposes.").

[76] S. 1709, 108th Cong. (2003); *see supra* note 68 (quoting synopsis).

[77] H.R. 3171, 108th Cong. (2003) ("To provide for an appropriate review of recently enacted legislation relating to terrorism to assure that powers granted in it do not inappropriately undermine civil liberties.").

[78] H.R. 1157, 108th Cong. (2003) ("To amend the Foreign Intelligence Surveillance Act to exempt bookstores and libraries from orders requiring the production of any tangible things for certain foreign intelligence investigations, and for other purposes.").

[79] H.R. 2429, 108th Cong. (2003) ("To amend the Foreign Intelligence Surveillance Act of 1978 to improve the administration and oversight of foreign intelligence surveillance, and for other purposes.").

the Patriot Act that affect civil liberties. Throughout the nation, more than 350 communities have passed resolutions criticizing sections of the Patriot Act and calling for the vigilant protection of civil liberties.[80] Scrutiny on all levels of government should focus much needed attention on those provisions posing the greatest risk to liberty.

2. Support for Expanded Law Enforcement Authority

Much positive support for the antiterrorism laws also exists, especially within the law enforcement community.[81] On July 13, 2004, the United States Department of Justice released a report extolling the success it has experienced due to the increased power it derives from the Patriot Act.[82] The report was issued as part of a Bush administration campaign to discourage Congress from weakening the law.[83]

In early 2003, the Justice Department drafted a legislative proposal entitled the Domestic Security Enhancement Act.[84] Perhaps the greatest insight into the Justice Department's campaign for increased authority, the proposal—nicknamed "Patriot II" or "Son of Patriot"—reached the public via leak, not

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[80] The ACLU hosts a webpage tracking those communities that have passed resolutions opposing sections of the Patriot Act. American Civil Liberties Union, http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207 (last visited Mar. 22, 2006).

[81] *See* U.S. DEP'T OF JUSTICE, REPORT FROM THE FIELD: THE USA PATRIOT ACT AT WORK 5 (2004), http://www.lifeandliberty.gov/docs/071304_report_from_the_field.pdf [hereinafter U.S. DEP'T OF JUSTICE, REPORT FROM THE FIELD] (asserting that greater coordination between law enforcement and intelligence officers "made possible by the . . . PATRIOT Act . . . have yielded extraordinary dividends by enabling the [Justice] Department to open numerous criminal investigations, disrupt terrorist plots, bring numerous criminal charges, and convict numerous individuals in terrorism cases"). *See generally* U.S. Dep't of Justice, http://www.lifeandliberty.gov (last visited Mar. 22, 2006) (expressing strong support for Patriot Act).

[82] "As of May 5, 2004, the Department has charged 310 defendants with criminal offenses as a result of terrorism investigations since the attacks of September 11, 2001, and 179 of those defendants have already been convicted." U.S. DEP'T OF JUSTICE, REPORT FROM THE FIELD, *supra* note 81, at 1.

[83] *Ashcroft Details Uses of Patriot Act*, CNN.COM, July 13, 2004, http://www.cnn.com/2004/ALLPOLITICS/07/13/patriot.act/index.html.

[84] *See* U.S. DEP'T OF JUSTICE, DOMESTIC SECURITY ENHANCEMENT ACT OF 2003 (2003), http://www.pbs.org/now/politics/patriot2-hi.pdf [hereinafter SECURITY ACT]; Matthew Brzezinski, *Fortress America*, N.Y. TIMES, Feb. 23, 2003, § 6 (Magazine), at 38 ("New legislative proposals by the Justice Department now seek to take the Patriot Act's antiterror powers several steps further, including the right to strip terror suspects of their U.S. citizenship.").

official release.[85] Congress played little or no role in its drafting, which has raised separation of powers concerns, in addition to the more common apprehensions regarding liberty.[86] In citing the Justice Department proposal by name within a bill designed to reassess recently enacted terrorism legislation, members of Congress have opposed the proposal's sweeping grants of authority that "are not related to terrorism, and would severely dilute and undermine many basic constitutional rights as well as disturb our unique system of checks and balances."[87] The proposal seems to make clear that the Justice Department will not only continue its lobbying against the sunset provisions and repeal of existing laws, but will actively seek to expand its power.

The Department's 120-page document makes the following proposals: to enhance the government's ability to collect data on citizens, such as increased access to consumer credit reports;[88] to more liberally collect genetic information;[89] to increase the surveillance power of the government;[90] to provide immunity

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[85] *See* Ramasastry, *supra* note 34.

[86] *See* Declan McCullagh, *Perspective: Ashcroft's Worrisome Spy Plans*, CNET NEWS.COM, Feb. 10, 2003, http://ecoustics-cnet.com.com/2010-1071_3-983921.html (" '[The proposal] transfers enormous power from the Congress and the judiciary to the executive branch and gives the attorney general absolutely unprecedented authority.' " (quoting Mark Rotenberg)); *see also* Benjamin Franklin True Patriot Act, H.R. 3171, 108th Cong. § 2(4) (2003) ("Future legislation . . . such as . . . the Domestic Security Enhancement Act . . . contains a multitude of new and sweeping law enforcement and intelligence gathering powers . . . [that threaten to] severely dilute and undermine many basic constitutional rights as well as disturb our unique system of checks and balances . . . .").

[87] *See* H.R. 3171 § 2(4).

[88] *See* SECURITY ACT, *supra* note 84, § 311(a) (providing for greater access by law enforcement to consumer reports and information); *see also* Ramasastry, *supra* note 34 (noting inclusion of portions of Admiral Poindexter's controversial Total Information Awareness ("TIA") program within Justice Department draft). As an initiative that would allow the government to compile data profiles of all Americans, the TIA program generated a wide backlash. *See id.* ("Congress recently warned against using TIA as a tool against US citizens. Nevertheless, Patriot II, as draft [sic] by the Attorney General and his staff, would begin to make TIA the law.").

[89] *See* SECURITY ACT, *supra* note 84, §§ 302(a)(1)(A), 303(a)(2), 303(a)(1) (allowing executive officials to collect DNA samples, fingerprints, and other identification information from suspected terrorists in custody, to receive such information from state, local, and foreign governments, and to establish identification databases). Critics of this proposal cite the government's allegedly broad definition of domestic terrorism, see *supra* note 31, as a potential catalyst for governmental abuse in collecting DNA and attempting to establish a database of genetic information. *See* Ramasastry, *supra* note 34.

[90] *See* SECURITY ACT, *supra* note 84, § 101 of Section-By-Section Analysis ("This provision would expand [the statutory] definition of 'foreign power' to include *all*

from liability to law enforcement, businesses, and others who provide terrorist tips;[91] to criminalize the use of encryption in furtherance of a federal felony;[92] to broaden the government's ability to keep information from the public;[93] and to deport and denaturalize American citizens.[94] Notably absent, however, from the Justice Department's proposals is a sunset provision.[95] Also, while the original Patriot Act purported to supply tools with which to combat terrorism,[96] the Justice Department's proposal

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persons, regardless of whether they are affiliated with an international terrorist group, who engage in international terrorism.") (emphasis in original). Critics charge that since the Justice Department's proposals eliminate the distinction between domestic and international terrorism the government's definition of domestic terrorism could lead to the conveyance of the looser standards that apply to foreign intelligence gathering to the domain of domestic criminal acts. *See* Ramasastry, *supra* note 34.

[91] *See* SECURITY ACT, *supra* note 84, § 313 ("[A] commercial or business entity, and any employee . . . of such . . . entity, shall not be subject to civil liability in any court for the voluntary provision or disclosure of information . . . based on a reasonable belief that . . . [it] may assist in the investigation or prevention of terrorist activities . . . ."). Of course, some concerns exist regarding the degree to which we want to encourage members of society to spy on each other. *See* Ramasastry, *supra* note 34 (comparing the potential effects of the Justice Department's proposals to those of Operation TIPS, a contentious program "which would have enlisted government employees to spy on citizens").

[92] *See* SECURITY ACT, *supra* note 84, § 404 ("Any person who, during the commission of a felony under Federal law, knowingly and willfully encrypts any incriminating communication or information relating to that felony . . . shall be imprisoned . . . ."); *see also* Ramasastry, *supra* note 34 (noting that this new crime, which is the first attempt to regulate encryption technology domestically, is not limited to terrorism). Conceivably, peer-to-peer file swappers who use encryption may automatically face years in prison if convicted for doing so while violating the Digital Millennium Copyright Act. *Id.*

[93] *See* SECURITY ACT, *supra* note 84, §§ 201 ("Prohibition of Disclosure of Terrorism Investigation Detainee Information"), 203 ("Information Relating to Capitol Buildings"), 204 ("Ex Parte Authorizations Under Classified Information Procedures Act"); *see also* Ramasastry, *supra* note 34 (listing non-disclosure enhancements for witnesses, grand juries, and detentions, and explaining the weakening of FOIA).

[94] *See* SECURITY ACT, *supra* note 84, § 501 ("[J]ust as an American can relinquish his citizenship by serving in a hostile foreign army, so can he relinquish his citizenship by serving in a hostile terrorist organization.") This applies to those who provide material support to a "group that the United States has designated as a 'terrorist organization,' if that group is engaged in hostilities against the United States." *Id.*

[95] *See* Ramasastry, *supra* note 34.

[96] *See* USA PATRIOT Act, Pub. L. No. 107-56, § 802, 115 Stat. 272 (2001) ("An Act [t]o deter and punish terrorist acts in the United States and around the world.").

for a Domestic Security Enhancement Act transcends any specific goal regarding terrorism.[97]

II. FIRST AMENDMENT JURISPRUDENCE

A. *A Brief History of Free Speech Protections*

The First Amendment to the United States Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[98] The Supreme Court did not commence substantial interpretation of the First Amendment until early in the twentieth century when Congress passed a pair of acts to suppress assertedly subversive speech around the time of the First World War.[99] This does not mean, however, that the government had not attempted to suppress political speech prior to World War I.[100] In fact, history has shown that during war and comparable times of crises, protecting civil liberties has often taken a back seat to combating or coping with the exigencies at hand.[101] The ebb of civil liberties during such trying times,

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[97] *See supra* note 84 and accompanying text; *see infra* text accompanying notes 168–69. For example, the proposed crime against using encryption to commit another crime mentions nothing of terrorism. Instead, the crime could be any federal crime, however trivial. *See supra* note 92.

[98] U.S. CONST. amend. I.

[99] *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 984 (15th ed. 2004). Congress passed the Espionage Act of 1917, Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 217–19, and the following year passed the Sedition Act of 1918, Act of May 16, 1918, ch. 75, 40 Stat. 553–54, *repealed by* Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359–60.

[100] *See* Act of July 14, 1798, 5th Cong., 2d Sess., 1 Stat. 596–97 (criminalizing "any false, scandalous and malicious writing or writings against the government of the United States . . . with intent to defame . . . or to bring [the government or its high officials] into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States . . . ."). This law, commonly known as the Sedition Act, was passed to insulate from criticism the administration of President John Adams. *See* Rosenzweig, *supra* note 11, at 668. During the Civil War, President Lincoln suspended the Writ of Habeas Corpus. *Id.* The conviction of a rebellious citizen by military tribunal rather than civilian court evidences Lincoln's fear that pro-South sedition would spread the Southern cause throughout the Northern states. *See* Ex Parte Milligan, 71 U.S. 2 (1866) (overruling the conviction of a citizen by military tribunal rather than by civilian court).

[101] *See* Rosenzweig, *supra* note 11, at 667–71 (citing historical examples from the Napoleonic wars through the American Civil War and World Wars I and II). During World War II, President Franklin Roosevelt signed Exec. Order No. 9066, 7

however, alternates with the reflection that occurs during peaceful or stable times.[102]

A string of cases immediately following World War I demonstrates the slow but progressive healing process.[103] While upholding the validity of the government's actions, the Court began to set forth the early principles regarding subversive political speech.[104] A series of concurring opinions by Justices

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Fed. Reg. 1407 (1942), which gave the Army authority to exclude anyone from areas it designated as under military control. Rosenzweig, *supra* note 11, at 669. This led to the internment of more than 110,000 people of Japanese descent. *Id.*; *see* Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (upholding the Executive Order).

The mass suspicion regarding Communist affiliations prompted the enactment of the Smith Act, ch. 439, 54 Stat. 670, 670–71 (1940) (codified at 18 U.S.C. § 2385); *see* Cole, *supra* note 23, at 6–8. The Smith Act "punished speech" and thus fueled the McCarthy era's aggressive campaign to punish people for their association with the Communist Party. *Id.* at 6–8, n.21; *see also* Dennis v. United States, 341 U.S. 494, 507–17 (1951) (upholding convictions under the Smith Act by employing a balancing test which favored the government).

The Sedition Act, while enacted during peacetime, was a response to the political turbulence within a young nation. *See supra* note 100. Although President Jefferson pardoned all those convicted under both the Alien and Sedition Acts, the acts themselves, generally regarded now as unconstitutional, were never tested in the Supreme Court. *See* Rosenzweig, *supra* note 11, at 668; *see supra* note 100 (mentioning Lincoln's suspension of the Writ of Habeas corpus).

[102] *See* Rosenzweig, *supra* note 11, at 670–71. "Though the Supreme Court initially approved most federal actions in support of the war, over the next half-century, the Court overruled every one of its World War I decisions, effectively repudiating the excess of that war-time era." *Id.* at 668–69; *see, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 452 (1969) (Douglas, J., concurring) ("Though I doubt if the 'clear and present danger' test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace."). Among the outmoded World War I decisions are Schenck v. United States, 249 U.S. 47 (1919), Debs v. United States, 249 U.S. 211 (1919), and Abrams v. United States, 250 U.S. 616 (1919).

"In 1988, President Ronald Reagan offered an official presidential apology and reparations to each of the Japanese-American internees." Rosenzweig, *supra* note 11, at 669; *see also* Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903, 903–04 (1988) (declaring Congress's apology "on behalf of the Nation" for the "grave injustice" of interning Japanese-Americans during World War II).

[103] *See infra* notes 104–05.

[104] *See Schenck*, 249 U.S. at 52 (containing the first pronouncement of Justice Holmes's "clear and present danger" test). Holmes said:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Id. Stating that "the character of every act depends upon the circumstances in which it is done," *id.*, Justice Holmes explained that the First Amendment would not protect someone who falsely shouts "fire" in a theatre. *Id.*

Holmes and Brandeis sketched many of the ideas that continue to underlie the modern Court's rationale for the protection of free speech.[105]

A few decades after the initial First Amendment cases, the Court dabbled with a balancing test which allowed for greater consideration of government interests[106] before moving toward the bright line approach ultimately adopted in *Brandenburg v. Ohio*.[107] While some Justices pushed for an absolutist approach to free speech,[108] the Court settled more comfortably into a categorical vision of free speech protections. The *Brandenburg* test set forth specific criteria the government was required to meet before it could proscribe speech.[109] Over time, this approach carved certain categorical exceptions to free speech protections.[110] On the whole, however, the consideration of the fundamental societal benefits of free speech remains at the heart

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[105] *See, e.g.*, Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). The majority and concurring opinions in *Whitney* offered separate glimpses of what was to come. In upholding a conviction for conspiring to overthrow the government, the majority inferred specific intent from Whitney's membership in the Communist Party, thus presaging the guilt by association rationale of the McCarthy era. *See id.* at 367–68. By contrast, Justice Brandeis's concurrence, in which Justice Holmes joined, foreshadowed many of the modern rationales for free speech protection. *See id.* at 373–78; *see infra* notes 107–17 and accompanying text.

[106] *See Dennis*, 341 U.S. at 507–17, 577–78 (upholding convictions under the Smith Act by employing a balancing test that favored the government); *see also supra* note 101.

[107] 395 U.S. at 447. The Court stated the principle as follows:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id. The Court in *Brandenburg* expressly overruled *Whitney*. *Id.* at 449.

[108] *See, e.g.*, *Dennis*, 341 U.S. at 579–81 (Black, J., dissenting) (advocating a literal interpretation of the First Amendment). "I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom." *Id.* at 580.

[109] *See Brandenburg*, 395 U.S. at 447. The requirements of *Brandenburg* are as follows: 1) the speech must be incitement; 2) the speech must be objectively likely to produce imminent lawless action; and 3) the speaker needs to have subjectively intended to produce such imminent lawless action. NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW 368 (2d ed. 1999); *see also supra* note 107.

[110] *See Brandenburg*, 395 U.S. at 447 (observing that incitement is exempt from First Amendment protection); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (fighting words); Miller v. California, 413 U.S. 15, 23 (1973) (obscenity); New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964) (limited protection for libel against public official).

of First Amendment jurisprudence.[111] The modern rationales for free speech fall loosely into several categories[112]: individual self-fulfillment;[113] the pursuit of knowledge and truth;[114] the participation in the democratic process essential to self-governance;[115] political dissent to effectuate social change;[116] and the practical effect of dissent as a safety-valve to diffuse societal tension.[117] It is with reference to these basic free speech rationales that First Amendment limits are based.[118]

Modern courts employ the doctrines of overbreadth and void-for-vagueness to analyze whether legislation adversely affects First Amendment rights.[119] The doctrine of overbreadth concerns the impermissible encroachment on protected speech that may be incidental to the legitimate exercise of government regulation.[120]

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111 *See* Scordato & Monopoli, *supra* note 1, at 192.

112 *See id.* at 192–99; REDLICH, *supra* note 109, at 365 (describing the rationales by scholars Alexander Meiklejohn and Thomas Emerson); *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) [hereinafter EMERSON, FREEDOM OF EXPRESSION]. *See generally* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966) [hereinafter EMERSON, GENERAL THEORY].

113 *See* Scordato & Monopoli, *supra* note 1, at 193. The inclusion in the Declaration of Independence of the unalienable right to the pursuit of happiness evidences the importance of this principle to our society. *See id.*

114 *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); *see also* Scordato & Monopoli, *supra* note 1, at 194–97.

115 *See* Scordato & Monopoli, *supra* note 1, at 197 ("If the legitimate authority of the government comes only from the consent of the governed, then it is important, in order for the government to possess legitimate authority, for those granting their consent to be reasonably well informed.") (citing ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1948)). Scordato and Monopoli list the institutional media as a separate rationale for free speech, but consider it "primarily an extension of the self-governance rationale." *See id.* at 198.

116 REDLICH, *supra* note 109, at 504; *see also* EMERSON, FREEDOM OF EXPRESSION, *supra* note 112, at 6–7.

117 *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies[.]"); Scordato & Monopoli, *supra* note 1, at 199 (describing the cathartic effect of free speech, which in turn avoids the social unrest that would otherwise accompany repressed grievances); *see also* REDLICH, *supra* note 109, at 503 (suggesting that freedom of speech actually constitutes a conservative notion because it fosters gradual societal change and helps to prevent revolution).

118 *See* Scordato & Monopoli, *supra* note 1, at 192.

119 *See infra* notes 120, 122.

120 *See* REDLICH, *supra* note 109, at 511.

When a law reaches both protected and unprotected speech, the Court is concerned about the potential chilling effect the law might have on those

This encroachment produces a chilling effect.[121] The void-for-vagueness doctrine has its roots in due process jurisprudence and involves the evaluation of whether a criminal statute is drafted to give citizens adequate notice of the illegality.[122] The courts dealing with cases arising under the Patriot Act have faced challenges arguing both of these claims.[123] Thus far, the courts have been more amenable to the vagueness argument[124] than the overbreadth argument,[125] or the oft-argued violation of associational rights.[126] But, of course, all of these determinations depend on the particular provision in question.

B. Free Speech and the Internet

"[T]he Supreme Court has been careful and vigilant in protecting free speech on the Internet."[127] The series of cases where the Court sustained online free speech protections against so compelling a governmental interest as the protection of

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> who wish to engage in protected speech. When a law is overbroad, the Court strikes down the entire law, even though the person challenging the law may have engaged in speech that is constitutionally unprotected.

Id. "The doctrine requires that an entire statute be invalidated because of its chilling effect on protected speech." *Id.* at 524.

In recent decades, the Supreme Court has allowed for the regulation of constitutionally protected speech if the regulation meets the strict scrutiny test, i.e., if it is narrowly tailored to a compelling governmental interest. *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1132 (2005). In examining the cases involving laws aimed at shielding children from sexually explicit material, *see, e.g.*, Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989), Volokh explores the application of strict scrutiny to "dual-use speech," explaining that material that is sexually explicit but not obscene can be lawfully used by adults but unlawfully distributed to children. Volokh, *supra*, at 1133. The Court has held that restricting all such distribution to adults to prevent the distribution to children would be "burn[ing] the house to roast the pig." *Id.* at 1133 (citing Butler v. Michigan, 352 U.S. 380, 383 (1957)).

[121] *See supra* note 120.

[122] *See* REDLICH, *supra* note 109, at 512 ("Laws are vague when individuals are unable to tell whether their conduct is legal or illegal.").

[123] *See supra* notes 28–29.

[124] *See supra* note 28.

[125] *See supra* note 29. The Ninth Circuit has rejected claims that certain provisions of the Patriot Act regarding material support are overbroad. *See id. But see* Doe v. Ashcroft, 334 F. Supp. 2d 471, 513–14 (S.D.N.Y. 2004) (holding unconstitutionally broad the non-disclosure provision of Section 2709).

[126] *See supra* note 30.

[127] Peter K. Yu, *New Technology and the Supreme Court: How Movie Censorship in the Early Twentieth Century Sheds Light on Contemporary Issues of Free Speech on the Internet*, FINDLAW, May 23, 2002, http://writ.news.findlaw.com/commentary/20020523_yu.html.

children manifests the Court's deference to free expression in cyberspace.[128] Recently, the Supreme Court sought to compel the government to explore alternative technologies as a means to further the government interest rather than rely on legislation that would impermissibly chill protected speech as an incidence to its enforcement.[129] In justifying its protective disposition toward cyberspace, the Court has distinguished the Internet from traditional broadcast media.[130] The characteristics of the Internet, however, continue to change; the challenge thus lies in developing sound principles to fit a medium where the constituent properties rapidly continue to evolve.

Online speech generally is protected by the First Amendment to the same extent as speech in newspapers or magazines.[131] Legislatures have wide latitude, however, to discriminate among various media—because such discrimination is based on the medium and is thus content-neutral—when drafting statutory media rights and privileges.[132] This leaves open, for example, the question regarding the extent to which those who publish on the Internet can consider themselves

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[128] *See* Ashcroft v. ACLU, 542 U.S. 656, 665–67 (2004) (upholding a preliminary injunction against the enforcement of the Child Online Protection Act ("COPA") since online filtering technology may be a viable alternative to protect children without COPA's chilling effect on protected speech); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256 (2002) (holding unconstitutionally overbroad provisions of the Child Pornography Prevention Act of 1996 ("CPPA") that related to "virtual" child pornography, which appeared to depict minors but were not produced using minors); Reno v. ACLU, 521 U.S. 844, 849 (1997) (striking down the Communications Decency Act of 1996 ("CDA") which was enacted to protect children from "indecent" and "patently offensive" Internet content).

[129] *See* Ashcroft v. ACLU, 542 U.S. at 660–61 (involving the protection of children).

[130] *See* Reno v. ACLU, 521 U.S. at 867 (noting that broadcasters historically have "received the most limited First Amendment protection" because of the inability of warnings to "adequately protect the listener from unexpected program content").

[131] Eugene Volokh, *The Future of Internet Speech*, TCS DAILY, Dec. 5, 2002, http://www.tcsdaily.com/article.aspx?id=120502B.

[132] *See id.*; *see also* Leathers v. Medlock, 499 U.S. 439, 453 (1991) (concluding that a state sales tax exemption for print media but not cable television is content-neutral and does not violate the First Amendment). States have differed in their approach to reconciling the advent of the Internet with statutes related to traditional media. *Compare* Mathis v. Cannon, 573 S.E.2d 376, 384–85 (Ga. 2002) (holding that a state retraction statute applies to Internet speech in addition to newspapers or other publications), *with* It's in the Cards, Inc. v. Fuschetto, 535 N.W.2d 11, 14 (Wis. Ct. App. 1995) (holding that a state retraction statute that protected periodicals did not apply to posts on Internet chatrooms).

"journalists" for the purpose of invoking the privileges customarily granted to that profession.[133] As "bloggers"[134] continue to log on in droves—and as their influence and value continue to be recognized[135]—the boundaries of such privileges remain nebulous. Thus, it seems the fundamental status distinction that has granted the press considerable protection in our society cannot be easily translated to apply within cyberspace. The challenge here lies in applying the rights and privileges appurtenant to the status of a person when the distributive nature of the source of online content makes it difficult to classify the persons providing that content.[136] Regardless of any ability to claim special press privileges, publishers of online content are still entitled to fundamental free speech protections.[137]

While considering speech within the context of cyberspace, the definition of speech itself warrants discussion. Traditionally, political justifications have served as the strongest basis for protecting speech.[138] Several courts, however, have upheld the notion that computer code itself constitutes protected free speech.[139] Of course, the Supreme Court has long recognized the

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[133] *See* Scordato & Monopoli, *supra* note 1, at 198–99 (discussing the special constitutional status granted to the institutional media).

[134] A blogger is someone who maintains an online journal. *See* Jennifer 8. Lee, *Year of the Blog? Web Diarists Are Now Official Members of Convention Press Corps*, N.Y. TIMES, July 26, 2004, at P7.

[135] *See id.* (describing how bloggers obtained press credentials to cover the 2004 presidential conventions); *see also* Matthew Klam, *Fear and Laptops on the Campaign Trail*, N.Y. TIMES, Sept. 26, 2004, § 6 (Magazine), at 43 *passim* (documenting the increasing influence of blogs in presidential campaigns).

[136] *See* Jonathan Band, *Congress Unknowingly Undermines Cyber-Security*, MERCURY NEWS (San Jose, Cal.), *available at* http://www.policybandwidth.com/doc/JBand-IPCyberSecurity.pdf (describing unintended chilling effect caused by attempts to categorize hackers in the Digital Millennium Copyright Act ("DMCA")).

[137] *See supra* notes 127–31.

[138] *See* Volokh, *supra* note 120, at 1150–51 (citing Carey v. Brown, 447 U.S. 455, 466–67 (1980) (recognizing speech concerning public issues as being on the "highest rung" of constitutional protection)); *supra* notes 112–17 and accompanying text (discussing the rationales of protecting speech).

[139] *See* Junger v. Daley, 209 F.3d 481, 485 (6th Cir. 2000) (declaring that computer source code was protected speech, but that its regulation would nevertheless depend upon balancing the national security interest in preventing the exportation of encryption software with the interests of protected speech). The *Junger* court distinguished between the expressive and functional features of source code, but concluded that constitutional protection should not be precluded because a medium of expression has a functional capacity. *See id.* at 484; *cf.* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 453 (2d Cir. 2001) (finding that the computer

notion that " 'all ideas having even the slightest redeeming social importance,' including those concerning 'the advancement of truth, science, morality, and arts' have the full protection of the First Amendment."[140] Computer code, however, serves a broader purpose than the mere conveyance of ideas; not only does code have substantial value as a language for communicating ideas,[141] but in the aggregate it composes the framework of the Internet, serving as its rivets and I-beams. It also acts as the law of cyberspace.[142] As such, computer code falls within the category of multi-purpose speech, warranting strict scrutiny by courts.[143]

Although a prior restraint on the publication of scientific speech has been upheld in lower federal courts on the ground of national security, the Supreme Court has never decided a case in which the issue was the constitutionality of suppressing scientific speech.[144] This leaves open the possibility that when the Court does confront this issue, it may be "facing a case where the government's argument for suppression will be hard for the Justices to resist."[145] This is especially true considering that "some scientific speech is now capable of facilitating some extremely serious harms."[146]

While many of the cases that relate to the Internet are a testament to the modern Supreme Court's strong protection of

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code was protected speech, but that the non-speech functional aspect of availing the code to accomplish the unauthorized and unlawful access to copyright protected material limited the scope of its First Amendment protection). *But see* DVD Copy Control Ass'n v. Bunner, 75 P.3d 1, 10–11 (Cal. 2003) (determining that although computer code is protected under the First Amendment, content-neutral injunctions regulating that speech are subject to a lesser standard of scrutiny than content-based regulation).

[140] *Junger*, 209 F.3d at 484 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

[141] *See id.* ("[C]omputer source code, though unintelligible to many, is the preferred method of communication among computer programmers.").

[142] *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999) ("Code is law.").

[143] *See* Volokh, *supra* note 120, at 1132.

[144] *See* United States v. Progressive, Inc., 467 F. Supp. 990, 999–1000 (W.D. Wis. 1979) (enjoining the publication of restricted data within an article on the hydrogen bomb). The court recognized that such publication fell within the "extremely narrow recognized area, involving national security, in which a prior restraint on publication is appropriate," and thus not violative of First Amendment rights. *Id.* at 1000; *see* Volokh, *supra* note 120, at 1150.

[145] Volokh, *supra* note 120, at 1156. Volokh argues that scientific speech deserves the robust protection offered to political speech. *See id.*

[146] *Id.*

free speech,[147] history demonstrates that the Court has acted with skepticism toward new technology.[148] "After all, it took the Court 35 years, two World Wars and a Great Depression to . . . extend free speech and free press protections to motion pictures."[149] In coupling this perspective of thin protection with the current war on terror, one has to consider that free speech protection on the Internet may be quite fragile.[150]

III. ANALYSIS: THE DELIBERATIVE FRAMEWORK NECESSARY TO EXAMINE THE DELETERIOUS EFFECT LAW ENFORCEMENT LEGISLATION MAY HAVE ON THE INTERNET

A. A Time for Response; A Time for Deliberation

In rapid response to the events of September 11, 2001, Congress enacted the Patriot Act just over a month after the terrorist attacks.[151] Acting pursuant to its unique Constitutional role,[152] Congress established a framework to confront the terrorist threat that, for the first time, had arrived on United

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147 *See supra* notes 128–30.

148 *See* Yu, *supra* note 127.

149 *Id.*; *see* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (overruling Mutual Film Corp. v. Indus. Comm'n, 236 U.S. 230 (1915) and extending free speech and free press protections to motion pictures). By originally declaring that the exhibition of motion pictures was conducted purely for profit, the Court, in the earlier case, had distinguished motion pictures from the other mediums of expression that had free speech protections. *See* Yu, *supra* note 127.

150 *See* Yu, *supra* note 127 (claiming that we should not take the Court's decisions protecting speech on the Internet for granted). "When *Ashcroft v. ACLU* returns to the Court—after the federal court of appeals has ruled on the questions the Supreme Court wisely refused to answer prematurely—the Supreme Court may be more reluctant to protect the right of free speech on the Internet." *Id.*; *see* Sanford Levinson, *What Is the Constitution's Role in Wartime?: Why Free Speech and Other Rights Are Not As Safe As You Might Think*, FINDLAW, Oct. 17, 2001, http://writ.news.findlaw.com/commentary/20011017_levinson.html ("[A]ll bets are off with regard to the courts offering genuine protection of civil liberties during time of war.").

151 *See supra* notes 5–6 and accompanying text.

152 *See* SULLIVAN & GUNTHER, *supra* note 99, at 362. The United States Constitution contains no "state of emergency" exception allowing for its suspension. *Id.* Article IV, § 4 of the Constitution similarly suggests that the Executive is to be looked to only when the Legislature cannot be convened. *See* U.S. CONST. art. IV, § 4. One only need look to the Weimar Constitution of 1919, which allowed Hitler to seize upon the emergency provisions that granted the executive nearly unlimited power in times of crisis, to see that alternative approaches allowing either for constitutional suspension or for broad executive action do not fit in with our concept of separation of powers. *See* SULLIVAN & GUNTHER, *supra* note 99, at 363.

States soil. Congress, therefore, took appropriate action to ensure the protection of America and the safety of its citizens. The separation of powers principle embedded in the Constitution—and which remains essential to our liberty—implicitly requires that the legislative branch take prompt action to mobilize the government against threats that not only challenge the institutions of government, but endanger the sovereignty of the people.[153] After the dust settles, however, our elected representative body should exercise the reciprocal duty—attendant to its obligation to act decisively to defend the country and citizens—to undertake the deliberative process fundamental to representative government. To hedge its bold response, Congress responsibly enacted a sunset provision, granting the members time to consider whether these laws should become permanent.[154]

As already posited, encroachment on free speech incidental to law enforcement may have a destructive effect where the Internet is concerned.[155] The courts have not yet forged firm First Amendment principles for the Internet, rendering it a distinct possibility that such destructive effects may occur.[156] Proper deliberation—with a thorough understanding and honest assessment of the potential costs to the Internet and society in general—is necessary to determine whether society considers a margin of destruction to cyberspace an acceptable price for security.

B. Ostensibly Under the Banner of Terrorism: Legislation That Transcends the Antiterrorism Purpose

It is necessary to distinguish between "law enforcement" legislation and "antiterrorism" legislation. Determining whether a particular provision serves antiterrorism goals is central to any debate regarding whether to sustain, truncate, or expand the Patriot Act or similar initiatives. The actual purpose of legislation, however, may be broader than antiterrorism

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[153] The separation of powers principle seeks to prevent the executive branch from usurping power even during crisis. *See* SULLIVAN & GUNTHER, *supra* note 99, at 360. The alternative to decisive legislative action likely would be demand for executive action, which would risk violating our fundamental system of government. *See supra* note 152.

[154] *See supra* notes 43, 53, 63 and accompanying text.

[155] *See supra* notes 141–43 and accompanying text.

[156] *See supra* note 150.

objectives, with the government seeking to augment its general power to prosecute.[157] Because the Department of Justice has shown a desire to include activities beyond the scope of terrorism,[158] it suffices to describe such potential legislation as "law enforcement" legislation.

There are provisions currently within the Patriot Act that do not relate directly to combating terrorism.[159] The stated purpose of the Act is "[t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes."[160] On its face, this statement appears clear in asserting that the legislation is intended to broaden law enforcement authority and to leave open the possibility for "other purposes."[161] But in considering the exigencies surrounding its hurried enactment, it seems more likely that the impetus to confront terrorism took precedent over ensuring proper analysis to determine whether each provision could be justified to the citizenry whose liberties were at stake.

In its haste, Congress packed provisions into the Patriot Act that had been undergoing extensive debate, independent of any overarching terrorist purpose, before September 11.[162] Congress did not have time to ensure that the legislation abridging civil liberties was drafted narrowly.[163] The courts, by applying strict scrutiny, have begun to determine that some provisions fail the test that a law be sufficiently narrow to serve a compelling government interest[164] Lawmakers themselves have also introduced proposals to curtail those provisions unjustifiably adverse to civil liberties, evidencing a desire to reopen some of the debates which had been ongoing before the enactment of the

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157 *See, e.g.*, *supra* note 38.

158 *See supra* Part I.B.2.

159 *See, e.g.*, USA PATRIOT Act, Pub. L. No. 107-56, § 202, 115 Stat. 272, 278 (2001); *see also supra* note 38.

160 *See* USA PATRIOT Act.

161 *See id.*

162 John Podesta, *USA Patriot Act: The Good, the Bad, and the Sunset*, HUM. RTS., Winter 2002, *available at* http://www.abanet.org/irr/hr/winter02/podesta.html ("Many of the electronic surveillance provisions in the Patriot Act faced serious opposition prior to September 11 from a coalition of privacy advocates, computer users, and elements of high-tech industry.").

163 *See supra* text accompanying note 120.

164 *See, e.g.*, Doe v. Ashcroft, 334 F. Supp. 2d 471, 514 (S.D.N.Y. 2004) (declaring that the non-disclosure provision of Section 505 of the Patriot Act is not sufficiently narrow); *see also supra* note 68 and accompanying text.

Patriot Act.[165] These debates would necessarily take on a distinct post-9/11 perspective, but would be debates nonetheless.

Within its proposed Domestic Security Enhancement Act, the Justice Department included provisions that would grant it even broader authority.[166] It may be debated whether these proposals would only incidentally serve the fight against terrorism and whether such ancillary benefits justify the abridgement of civil liberties. But as the title of the draft suggests—Domestic Security Enhancement Act—the aggregate of these proposals transcends any purported antiterrorism purpose. Included are provisions having nothing to do with terrorism.[167] Some lawmakers expressly criticized this absence of a relationship with terrorism.[168] Once again, close scrutiny must be applied during legislative deliberation to each provision and its potential ramifications.

The computer fraud provisions within the Patriot Act[169] and the encryption provisions among the new proposals[170] serve as two concrete examples that affect the computer industry yet have no primary focus toward stemming terrorism. Of course, that is not to say that such provisions would never provide any benefit to the cause of fighting terrorism. But, pursuant to the principle that legislation which abridges civil liberties be drafted narrowly,[171] such speculation of potential achievement cannot pass muster. While either provision may provide effective law enforcement in its own right, to strike an honest balance between proper government activity and improper infringement on rights, it is crucial to separate such provisions from those laws with the direct goal of combating terrorism.

C. On the Effects of Prosecuting Online Service Providers

A new government strategy to pursue terrorist activity on

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[165] *See supra* notes 68–79.

[166] *See* SECURITY ACT, *supra* note 84 *passim*.

[167] *See id.* §§ 105 ("Law Enforcement Use of FISA Information"), 404 ("Use of Encryption to Conceal Criminal Activity"); *supra* note 84; *see also supra* notes 92, 97 and accompanying text.

[168] *See* H.R. 3171, 108th Cong. § 2(4) (2003); *see also supra* text accompanying note 87.

[169] *See* USA PATRIOT Act, Pub. L. No. 107-56, § 202, 115 Stat. 272, 278 (2001); *see also supra* note 38.

[170] *See supra* note 92 and accompanying text.

[171] *See supra* note 120.

the Internet targets hosting websites, despite the fact that the host is not necessarily the author of the content.[172] Prosecutors charge that administrators of websites should be held criminally liable for what appears on their sites.[173] To this end, the government seeks to exploit the "expert advice or assistance" definition within the material support provision of the Patriot Act.[174] Other law enforcement initiatives have legitimately thwarted the ability of terrorists to use the Internet, such as the government's campaign against the financial support of terrorists.[175] The financial support campaign, however, can be distinguished from the "expert advice or assistance" initiative because it is limited to targeting financial support services—comprising only a fraction of total Internet activity—using specific regulations.[176] A campaign against website administrators, however, threatens to affect the functionality of the Internet itself and signals a heightened risk of chilling Internet activity.[177]

Both the courts and Congress have generally limited liability for online providers of access, transmission, or other services.[178] In the context of defamation, the online web provider is shielded from liability for its hosted content much like a bookstore is shielded from defamatory content in books.[179] To further protect providers of online services, Congress essentially severed an online service provider ("OSP") from an information content provider for the purpose of limiting OSP liability for failure to block offensive material.[180] Although the law does not extend to

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172 *See* Eric Lipton & Eric Lichtblau, *Online and Even Near Home, a New Front Is Opening in the Global Terror Battle*, N.Y. TIMES, Sept. 23, 2004, at A12.

173 *Id.*

174 *See id.*; *see also* USA PATRIOT Act § 805; *supra* notes 22–23 and accompanying text.

175 *See generally* Todd M. Hinnen, *The Cyber-Front in the War on Terrorism: Curbing Terrorist Use of the Internet*, 5 COLUM. SCI. & TECH. L. REV. 5 (2004) (describing the campaign against internet-facilitated financial support of terrorism).

176 *See id.*

177 *See* Band, *supra* note 136.

178 *See infra* note 180 and accompanying text.

179 *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 141 (S.D.N.Y 1991) (holding that the defendant provider had no liability for defamatory statements in its electronically available service).

180 *See* Communications Decency Act § 230 (codified at 47 U.S.C. § 230). The portion which severs liability states that "[n]o provider . . . of an *interactive computer service* shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* § 230(c)(1) (emphasis added). The statute

criminal prosecutions, it reveals a commitment to keep sources of content and providers of services separate.[181] The important contribution of such services to the free flow of information corresponds with the free speech rationale expressed by Justice Holmes as a marketplace of ideas.[182] Requiring web hosting companies to review all their data and transmissions poses a significant risk to the entire distribution scheme.[183] Considering the reliance on individual private initiative to sustain the upkeep of the decentralized network architecture of the Internet, the distinction between content and service providers supported by the legislation seems crucial to prevent the chill resulting from private over-regulation that would likely accompany such a fear of prosecution.[184]

Some courts have recognized already the problems inherent in legislation that criminalizes by broad strokes, declaring the "expert advice and assistance" provision unconstitutionally vague.[185] Other courts have expressly refused to find it either overbroad or a violation of associational speech.[186] This is not,

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defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." *Id.* § 230(f)(2). The statute further defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3).

[181] *See, e.g.*, Ford Motor Co. v. GreatDomains.com, Inc., No. 00-CV-71544-DT, 2001 WL 1176319 (E.D. Mich. Sept. 25, 2001) (trademark infringement).

[182] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also supra* note 114.

[183] This distributor exception is not an idea that is new or unique to the Internet. *See* Lerman v. Flynt Distrib. Co., 745 F.2d 123 (2d Cir. 1984) (applying the distributor exception to magazine distribution company).

[184] Scordato and Monopoli describe the post-9/11 private reaction to publishers' and network executives' popular perception that the majority of Americans believe that speech critical of the government should be suppressed. *See* Scordato & Monopoli, *supra* note 1, at 188. The private censorship resulting from television networks' fear of negative public reaction is analogous to the over-regulation that would arise from fear by OSPs of criminal sanctions. *Id.*

[185] *See, e.g.*, Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134 (C.D. Cal. 2005). Courts have similarly found other provisions unconstitutionally vague. *See* Humanitarian Law Project v. Reno, 205 F.3d at 1137–38 (holding that the terms "training" and "personnel" are unconstitutionally vague); *Sattar*, 272 F. Supp. 2d at 356–61 (dismissing the counts of the indictment based on the vagueness of the terms "communications equipment" and "personnel"); *see also supra* note 28.

[186] *See, e.g.*, Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1201–02 (C.D. Cal. 2004); *see also supra* notes 29–30.

however, the first time recent legislation was alleged to have a chilling effect online.[187] Many critics of the Digital Millennium Copyright Act ("DMCA")[188] assert that there was a chilling effect imposed on legitimate computer security research by the provision that prohibits the circumvention of copyright protection technology.[189] It is conceivable that the "expert advice and assistance" provision will chill both content providers and service providers. While content providers, as speakers, may be afforded less protection in instances that fall under traditional free speech exceptions,[190] service providers may find themselves in the precarious situation of not being able to examine or comprehend feasibly all the messages that are stored in their extensive digital domains.

D. Construing the Mens Rea Requirement of the Material Support Provision

Considering that the material support provision seems to be the workhorse statute of the government in its campaign against terror and that it is being considered for aggressive new initiatives, it is necessary to examine how courts thus far have interpreted the statute. Section 2339B of title 18 of the United States Code—established by the AEDPA and modified by the Patriot Act—reads as follows:

> Whoever *knowingly* provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.[191]

Congress again amended the material support provision in 2004, declaring that to violate the provision, "a person must have knowledge that the organization is a designated terrorist

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[187] *See* Jonathan Band, *supra* note 136 (describing the chilling effect caused by the Digital Millennium Copyright Act).

[188] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

[189] *See* Band, *supra* note 136.

[190] *See, e.g.*, Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1086 (2002) (holding that a website containing a list of the names of doctors providing abortions with lines drawn through the names of doctors who had provided abortions and had been killed or wounded constituted a true threat that is not protected speech).

[191] 18 U.S.C. § 2339B(a)(1) (emphasis added).

organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism."[192]

Prior to the 2004 amendment, the Florida District Court, in *United States v. Al-Arian*, construed the statute to require a mens rea of specific intent, in an attempt to reach the appropriate balance between government interests and individual rights.[193] Noting that "[t]he Supreme Court has repeatedly recognized that a *scienter* or *mens rea* requirement may mitigate a law's vagueness,"[194] the court exercised judicial restraint in interpreting the statute in a manner that avoided the constitutional challenge.[195] The court essentially rescued the statute from being declared unconstitutionally vague by requiring a specific intent to further the illegal activities of an FTO.[196] In the course of doing so, the court expressly disapproved of the Ninth Circuit's determination that the statute is unconstitutionally vague.[197]

The Ninth Circuit, in *Humanitarian Law Project v. Reno*,

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[192] Intelligence Reform and Terrorism Prevention Act, Pub. L. No. 108-458, 118 Stat. 3638, 3762–63 (2004) (codified at 18 U.S.C. § 2339B).

[193] *See* United States v. Al-Arian ("*Al-Arian II*"), 329 F. Supp. 2d 1294, 1296 (M.D. Fla. 2004). The court held that the statute required the government to "prove beyond a reasonable doubt that the defendant knew that: (a) the organization was a FTO or had committed unlawful activities that caused it to be so designated; and (b) what he was furnishing was 'material support[,]' " with the "specific intent . . . that the support would further the illegal activities of the FTO." *Al-Arian I*, 308 F. Supp. 2d 1322, 1338–39 (M.D. Fla. 2004).

The Seventh Circuit similarly held, in the context of civil liability for violation of § 2339B, that the plaintiff must prove the defendant knew about the unlawful activities of the FTO and intended to assist in those activities. *See* Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev., 291 F.3d 1000, 1023–25 (7th Cir. 2002). In defending its construction of § 2339B, the Florida District Court in *Al-Arian I* cited the Seventh Circuit's decision in *Boim*, concerning civil liability, to explain the importance of avoiding "the anomaly of civil liability being more narrow than criminal liability based on the same statutory language." *Al-Arian I*, 308 F. Supp. 2d at 1339 n.33.

[194] *Al-Arian I*, 308 F. Supp. 2d at 1338 n.32 (citing Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1994)).

[195] *See Al-Arian II*, 329 F. Supp. 2d 1294, 1298 (M.D. Fla. 2004) (citing Jones v. United States, 526 U.S. 227, 239–40 (1999)); *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (asserting that, as long as it is not contrary to the intent of Congress, a statute should be interpreted in a manner that avoids constitutional problems).

[196] *See supra* note 193.

[197] *See* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1138 n.5 (9th Cir. 2000).

originally construed § 2339B as requiring "knowingly" to modify only "provides."[198] This meant that the scienter requirement was met when the accused had knowledge that he provided *something*, rather than knowledge that he was providing "material support."[199] The court in *Al-Arian* discussed the potential for absurdity resulting from this interpretation.[200] For example, "a donor could be convicted for giving money to a FTO without knowledge that an organization was a FTO or that it committed unlawful activities, and without an intent that the money be used to commit future unlawful activities."[201] "Similarly, a bank teller who cashes the donor's check for a FTO could also be guilty despite a similar lack of knowledge."[202]

A few years later, in *Humanitarian Law Project v. Ashcroft*, the Ninth Circuit reconsidered its construction of the mens rea requirement and concluded that § 2339B also required that the accused either 1) know that the organization was an FTO, or 2) know of the organization's unlawful activities that caused it to be designated an FTO.[203] The court ended up reaffirming its prior vagueness finding without accounting for any changes brought by the new mens rea requirement.[204] The court in *Al-Arian* rejected this construction as well, citing with disapproval the potentially odd results still remaining with this expanded construction.[205] For example, as construed by the Ninth Circuit:

> [A] cab driver could be guilty for giving a ride to a FTO member to the U[nited] N[ations], if he knows that the person is a member of a FTO or the member or his organization at sometime conducted an unlawful activity in a foreign country. Similarly, a hotel clerk in New York could be committing a

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[198] *Al-Arian I*, 308 F. Supp. 2d at 1337 (citing Humanitarian Law Project v. Reno, 205 F.3d at 1138 n.5).

[199] *Id.* (agreeing with the Ninth Circuit that "a purely grammatical reading of the plain language of Section 2339B(a)(1) makes it unlawful for any person to knowingly furnish any item contained in the material support categories to an organization that has been designated a FTO").

[200] *Id.*

[201] *Id.*

[202] *Id.* at 1337 n.28.

[203] *See* Humanitarian Law Project v. Ashcroft, 352 F.3d 382, 400 (9th Cir. 2003).

[204] *Al-Arian I*, 308 F. Supp. 2d at 1338 (citing Humanitarian Law Project v. Ashcroft, 352 F.3d at 403–05).

[205] *Id.* at 1337–38.

> crime by providing lodging to that same FTO member under similar circumstances as the cab driver.[206]

The court in *Al-Arian* concluded that it was more consistent with Congress's intent to imply a mens rea requirement to the material support provision.[207] The court said that this construction not only avoids the constitutional vagueness problem, but also comports with the Supreme Court's prior holding that a mens rea requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.[208] In a later order within the same case, the court rejected the argument that the expanded scienter requirement would hamper the government's antiterrorism campaign, asserting that the requisite intent can easily be inferred from circumstantial evidence.[209]

The Florida District Court, however, seems to stand alone in its construction of § 2339B. Most recently, a New York District Court rejected a defendant's contention that the government must prove that he acted with specific intent to further the illegal activities of the foreign terrorist organization, stating that such a conclusion "departs from the majority of existing authority."[210] Similarly, the Ninth Circuit concluded that Congress dispensed with any specific intent requirement in its 2004 amendment of the material support provision.[211] The Northern District of Illinois, too, has disputed the additional requirement of a finding that a defendant specifically intended to further terrorist activities, stating:

> [T]he additional requirement finds no basis in the statute's language. Moreover, such a reading clashes with Congress's intent. As the Seventh Circuit has recognized, in enacting the

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206 *Id.*

207 *Id.* at 1338.

208 *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994).

209 United States v. Al-Arian (*Al-Arian II*), 329 F. Supp. 2d 1294, 1305 (M.D. Fla. 2004) ("This [c]ourt reiterates that it is in no way creating a safe harbor for terrorists or their supporters . . . . Instead, [it] is attempting to construe Section 2339B(a)(1) in a manner that avoids constitutional infirmity.").

210 United States v. Paracha, No. 03 CR. 1197(SHS), 2006 WL 12768, at *25 (S.D.N.Y. Jan. 3, 2006) (acknowledging that the Second Circuit has not yet addressed the issue).

211 Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134, 1147 (C.D. Cal. 2005) ("This [c]ourt must assume that Congress, with full awareness of [the *Al-Arian* and *Humanitarian Law Project*] decisions, incorporated the [Ninth Circuit's] holding into the statute and rejected the *Al-Arian* ruling requiring specific intent.").

> AEDPA, []Congress determined that foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.[212]

Most of these cases, however, primarily deal with material support other than "expert advice or assistance," usually comprising some form of financial support. Notwithstanding its rejection of a specific intent requirement, the Ninth Circuit has consistently held the "expert advice or assistance" provision to be unconstitutionally vague.[213] Congress attempted to clarify the meaning of "expert advice or assistance" by defining it as "scientific, technical, or other specialized knowledge."[214] The Ninth Circuit, however, found this definition lacking, stating that "the 'specialized knowledge' portion of this definition is vague because it merely repeats what an expert is and provides no additional clarity."[215] Thus, the questions remain: will other courts declare the "expert advice and assistance" provision unconstitutionally vague, and may a more stringent specific intent requirement be required to save this portion of the statute?

Applying the *Al-Arian* mens rea construction in the "expert advice or assistance" context seemingly mitigates the risk of a cyber chilling effect resulting from what has become the government's primary tool for pursuing terrorism, at least in terms of OSPs.[216] Many internet sites hosting militant Islamic message boards are run on computer servers within the United States.[217] Requiring providers of online services to have a specific intention to further the illegal activities of an FTO would likely eliminate much of the fear by OSPs that liability may lie in some sector of their technology sphere. Without a requirement of specific intent, an OSP faces the insurmountable chore of ensuring that it is not unwittingly hosting a website that may be providing material support to terrorists.[218] Furthermore, the

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[212] United States v. Marzook, 383 F. Supp. 2d 1056, 1070 (N.D. Ill. 2005) (citation omitted).

[213] Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d at 1139.

[214] *Id.* at 1151.

[215] *Id.*

[216] *See supra* note 23 and accompanying text.

[217] *See* Lipton & Lichtblau, *supra* note 172.

[218] This is especially true considering the vast size of the hosting architecture within many of the larger companies and the manpower necessary to parse stored

language difference invites the targeting of Muslim websites, a discriminatory activity that itself would compromise important Constitutional rights.[219]

By requiring specific intent, the Florida District Court rescued—at least within its jurisdiction—a statute that may legitimately aid the government in pursuing terrorists.[220] As it asserted, the government would not be hampered in its campaign against terrorism since specific intent can be inferred from circumstantial evidence.[221] Courts in two important centers of the computer industry, California and New York, have already declared portions of the material support provision unconstitutionally vague.[222] Requiring specific intent, at least in instances where "expert advice and assistance" is at issue, may be a viable solution that both sustains the government's ability to prosecute those who aid terrorists and avoids an overly broad enforcement sweep that risks chilling OSPs from performing their crucial role of hosting on the Internet. As more courts confront the "expert advice or assistance" provision, particularly in the technological arena, they should consider following the lead of the Florida District Court and read in the requirement of specific intent.

E. The Incentive to Delete Information to Avoid Liability

The danger of private censorship is easily imaginable in the OSP context, as web hosting companies may preemptively pull down material from which they fear liability.[223] Similarly, the implementation by OSPs of business policies to avoid liability

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information and to monitor activity. Moreover, much of the server space, in which data and websites are stored, is sold to clients who then resell it to their customers. *Id.*

[219] *See id.* (reporting the charge that concentrating on Islamic websites while ignoring domestically produced anarchist manuals available on the internet amounts to an anti-Muslim campaign).

[220] *See Al-Arian II*, 329 F. Supp. 2d 1294, 1299 (M.D. Fla. 2004) ("By this Court resolving those constitutional concerns in the manner that it did, this Court avoided doing grievous harm to Section 2339B by declaring all or parts of it unconstitutional.").

[221] *See supra* note 209 and accompanying text.

[222] *See* Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1200 (C.D. Cal. 2004); United States v. Sattar, 272 F. Supp. 2d 348, 358 (S.D.N.Y. 2003).

[223] *See supra* note 184 (describing private, as opposed to government, self-regulation).

may adversely affect the free flow of information.[224] In August, 2004, the Electronic Frontier Foundation compiled a best-practices list for online service providers ("OSPs")[225] wherein it recommended that OSPs set policies to minimize data retention to limit their liability risks, avoid the high cost of having to search through all their data upon the receipt of a subpoena, and protect the privacy of their users.[226] Essentially, this requires the deletion of all data not deemed necessary for their service.[227]

The irony here is that the expanded law enforcement authority granted by the Patriot Act motivated such recommendations.[228] But if OSPs follow these recommendations—which they have great incentive to do considering the risks of liability and excess costs—then there will be a significantly diminished data trail and thus no data for the government to seize pursuant to its increased authority.[229] This means that when the urgent need for information legitimate to a pressing terrorist or national security matter arises, there may be no such information on record. Under those circumstances, there would indeed be a law enforcement chill.

CONCLUSION

The Internet is a relatively new medium of communications, and its networked, decentralized nature makes it difficult to define its properties. Thus, regulation of this medium—which relies on its users to construct the architecture, provide the content, and organically improve the state-of-the-art—is tricky and potentially destructive. The deliberative process envisioned by the Founding Fathers affords the best opportunity to prevent overly broad legislation from riding society's fear of terrorism into constitutional territory—an area which typically requires compelling reasons for the abridgment of fundamental rights. Broad legislation that ostensibly comports with the goal of combating terrorism reflects the fear of a nation determined to do

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224 *See* ELECTRONIC FRONTIER FOUNDATION, BEST DATA PRACTICES FOR ONLINE SERVICE PROVIDERS 1–3 (2004), http://www.eff.org/osp/20040819_OSPBest Practices.pdf (recommending that companies implement business policies that would limit the amount of data they store in order to avoid liability).

225 *Id.*

226 *Id.*

227 *See id.*

228 *See id.*

229 *See id.*

whatever it takes to stop the next terrorist attack. Yet portions of such legislation may have minimal benefit in countering terrorism while having deleterious effects on fundamental rights.

The terrorist threat will likely plague society well into the future. As the war on terrorism perseveres, the stark realities of an enduring conflict demand, for the sake of preserving liberty, that lawmakers employ the discipline necessary to scrutinize the benefits and costs of each grant of authority that may abridge constitutionally protected liberties. A necessary component of such examination is the consideration of the effects such laws may have on the Internet. The Internet is dependent upon the unbridled exchange of ideas. Ignoring this reliance may hinder the development of the Internet, which will ultimately be to the detriment of this nation. As progress has always been this nation's credo, freedom has been its engine. And freedom of thought and speech is "the matrix, the indispensable condition, of nearly every other form of freedom."[230] While deciding whether to limit the protections of free speech, we must give thorough consideration to the cost of a chill over the Internet.

[230] Palko v. Connecticut, 302 U.S. 319, 327 (1937) (quoting Justice Cardozo).